DEPARTM

22 CFR Parts 120, 126, and 127

[Public Notice: 11532]

RIN 1400-AF39

International Traffic in Arms Regulations: Corrections and Clarifications for Export and Reexport; Canadian Exemptions; Exemptions Regarding Intra-Company, Intra-Organization, and Intra-Governmental Transfers to Employees Who Are Dual Nationals or Third-Country Nationals; and Voluntary Disclosures

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: The Department of State (DOS) proposes to amend the International Traffic in Arms Regulations (ITAR) to clarify the definitions of export and reexport. Further, the Department proposes to replace the term "national" with "person" in the Canadian exemptions; revise the exemption for intra-company, intra-organization, and intra-governmental transfers to dual nationals or third-country nationals; and correct administrative errors in the section on voluntary disclosures.

DATES: The Department of State will accept comments on this proposed rule until **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER***].

ADDRESSES: Interested parties may submit comments by one of the following methods:

- *Email:* DDTCPublicComments@state.gov with the subject line: "Regulatory Change: ITAR Sections 120, 126 and 127"
- *Internet:* At www.regulations.gov, search for this notice, Docket DOS-2021-0031.

Comments received after that date may be considered if feasible, but consideration cannot be assured. Those submitting comments should not include any personally identifying information they do not desire to be made public or information for which a claim of confidentiality is asserted, because comments and/or transmittal emails will be made available for public

inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls website at *www.pmddtc.state.gov*. Parties who wish to comment anonymously may do so by submitting their comments via *www.regulations.gov*, leaving the fields that would identify the commenter blank and including no identifying information in the comment itself.

FOR FURTHER INFORMATION CONTACT: Ms. Engda Wubneh, Foreign Affairs Officer, Office of Defense Trade Controls Policy, U.S. Department of State, telephone (202) 663-1809; e-mail DDTCCustomerService@state.gov. ATTN: Regulatory Change, ITAR parts 120, 126, and 127

SUPPLEMENTARY INFORMATION: The Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise the definitions of export (ITAR § 120.17) and reexport (ITAR § 120.19) to clarify that any release of technical data to a foreign person described within the respective definitions is a release only to any countries in which that foreign person currently holds citizenship or permanent residency. Since the Department published "International Traffic in Arms Regulations: Revisions to Definition of Export and Related Definitions" (81 FR 35611) in 2016, the Department has changed its assessment that inclusion of prior citizenship or permanent residency in ITAR §§ 120.17(b) and 120.19(b) is necessary based on its experience with this provision. The Department assesses that a foreign person's former citizenship or permanent residency status in a country should not be deemed to automatically result in an export or reexport to that country. The Department proposes this change to better align with our policy and requirements in Section 126.18 and to provide greater opportunities for foreign persons who are no longer citizens or permanent residents of certain countries to participate in ITAR-regulated activities.

Further, the Department proposes to replace the term "national" with the ITAR-defined term "person" in ITAR § 126.5(b) of the Canadian exemption to be consistent with how foreign persons are defined in the ITAR. The Department also proposes to remove the phrase "although nationality does not, in and of itself, prohibit access to defense articles" from ITAR

§ 126.18(c)(2) as the definitions of export and reexport provide that a release to a foreign person constitutes an export or reexport, as applicable, to all countries in which the foreign person holds citizenship or permanent residency. This proposed change is not intended to convey any change to the Department's long-standing position that the purpose of vetting employees from countries listed in ITAR § 126.1 is to mitigate diversion. Further, simply identifying nationalities with no substantive contacts with ITAR § 126.1 countries is not a precondition to rely on to use the exemption for intra-company, intra-organization, and intra-governmental transfers to dual or third-country nationals. The Department also proposes to clarify ITAR § 126.18(c)(2) by stating that the screened employee, not the end-user or consignee, must execute a nondisclosure agreement to provide assurances that said employee will not transfer any unclassified defense articles to unauthorized persons.

Lastly, the Department proposes to correct administrative errors in the voluntary disclosures section of the ITAR by providing the correct references to exemptions pursuant to the Defense Trade Cooperation Treaties between the United States and Australia and the United States and the United Kingdom in ITAR §§ 126.16 and 126.17, respectively. Additionally, the Department proposes to streamline the section on voluntary disclosures by simply referencing the relevant ITAR sections, §§ 126.1(e), 126.16(h)(8), and 126.17(h)(8), that describe the duties of persons to notify the Directorate of Defense Trade Controls of particular activities.

Regulatory Analysis and Notices

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA), pursuant to 5 U.S.C. 553(a)(1).

Since the Department is of the opinion that this rule is exempt from 5 U.S.C 553, it is the view of the Department that the provisions of Section 553(d) do not apply to this rulemaking.

Regulatory Flexibility Act

Notwithstanding the Department's publication of this rulemaking as a proposed rule, this rule is exempt from the notice-and-comment rulemaking provisions of 5 U.S.C. 553 as a foreign affairs function. Therefore, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Executive Orders 12372 and 13132

This rulemaking will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). This rule's scope does not impose additional

regulatory requirements or obligations; therefore, the Department believes costs associated with this rule will be minimal. Although the Department cannot determine based on available data how many fewer licenses will be submitted as a result of this rule, the amendments to the definitions of export and reexport will inherently relieve the licensing burden for some exporters. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated as a ‘‘nonsignificant regulatory action’’ by the Office and Information and Regulatory Affairs under Executive Order 12866.

Executive Order 12988

The Department of State has reviewed this rulemaking in light of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act

This rulemaking does not impose or revise any information collections subject to 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Parts 120, 126, and 127

Arms and munitions, Classified information, Crime, Exports, Penalties, Seizures and forfeitures.

For the reasons set forth above, the Department of State proposes to amend 22 CFR parts 120, 126, and 127 as follows:

PART 120 – PURPOSE and DEFINITIONS

1. The authority citation for part 120 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2794; 22 U.S.C. 2651a; Pub. L. 105-261, 112 Stat. 1920; Pub. L. 111-266; Section 1261, Pub. L. 112-239; E.O. 13637, 78 FR 16129.

2. Amend § 120.17 by revising paragraph (b) to read as follows:

§120.17 Export.

* * * * *

(b) Any release in the United States of technical data to a foreign person is deemed to be an export to all countries in which the foreign person holds citizenship or permanent residency.

* * * * *

3. Amend § 120.19 by revising paragraph (b) to read as follows:

§120.19 Reexport.

* * * * *

(b) Any release outside the United States of technical data to a foreign person is deemed to be a reexport to all countries in which the foreign person holds citizenship or permanent residency.

* * * * *

PART 126 – GENERAL POLICIES AND PROVISIONS

4. The authority citation for part 126 continues to read as follows:

Authority: 22 U.S.C. 2752, 2778, 2780, 2791, and 2797; 22 U.S.C. 2651a; 22 U.S.C. 287c; Sec. 1225, Pub. L. 108–375; Sec. 7089, Pub. L. 111–117; Pub. L. 111–266; Sections 7045 and 7046, Pub. L. 112–74; E.O. 13637, 78 FR 16129.

5. Amend § 126.5 by revising paragraph (b) to read as follows:

§126.5 Canadian exemptions.

* * * * *

(b) *Permanent and temporary export of defense articles.* Except as provided in Supplement No. 1 to part 126 of this subchapter and for exports that transit third countries, Port Directors of U.S. Customs and Border Protection and postmasters shall permit, when for end-use in Canada by Canadian Federal or Provincial governmental authorities acting in an official capacity or by a Canadian-registered person, or for return to the United States, the permanent and temporary export to Canada without a license of unclassified defense articles and defense services identified on the U.S. Munitions List (22 CFR 121.1). The exceptions are subject to meeting the requirements of this subchapter, to include 22 CFR 120.1(c) and (d), parts 122 and 123 (except insofar as exemption from licensing requirements is herein authorized) and §126.1, and the requirement to obtain non-transfer and use assurances for all significant military equipment. For purposes of this section, "Canadian-registered person" is any Canadian person (including Canadian business entities organized under the laws of Canada), dual citizen of Canada and a third country other than a country listed in §126.1 of this subchapter unless the conditions of § 126.18(c) are satisfied, or permanent resident registered in Canada in accordance with the Canadian Defense Production Act, and such other Canadian Crown Corporations identified by the Department of State in a list of such persons publicly available through the website of the Directorate of Defense Trade Controls and by other means.

* * * * *

6. Amend § 126.18 by revising paragraph (c)(2) to read as follows:

§126.18 Exemptions regarding intra-company, intra-organization, and intra-governmental transfers to employees who are dual nationals or third-country nationals.

* * * * *

(c) * * *

(2) The end-user or consignee to have in place a process to screen its employees and for the employees to have executed a nondisclosure agreement that provides assurances that the

employee will not transfer any defense articles to persons unless specifically authorized. The end-user or consignee must screen its employees for substantive contacts with restricted or prohibited countries listed in §126.1. Substantive contacts include regular travel to such countries, recent or continuing contact with agents, brokers, and nationals of such countries, continued demonstrated allegiance to such countries, maintenance of business relationships with persons from such countries, maintenance of a residence in such countries, receiving salary or other continuing monetary compensation from such countries, or acts otherwise indicating a risk of diversion. An employee who has substantive contacts with persons from countries listed in §126.1(d)(1) shall be presumed to raise a risk of diversion, unless DDTC determines otherwise. End-users and consignees must maintain a technology security/clearance plan that includes procedures for screening employees for such substantive contacts and maintain records of such screening for five years. The technology security/clearance plan and screening records shall be made available to DDTC or its agents for civil and criminal law enforcement purposes upon request.

* * * * *

PART 127 – VIOLATIONS and PENALTIES

7. The authority citation for part 127 continues to read as follows:

Authority: Sections 2, 38, and 42, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2791); 22 U.S.C. 401; 22 U.S.C. 2651a; 22 U.S.C. 2779a; 22 U.S.C. 2780; E.O. 13637, 78 FR 16129; Pub. L. 114-74, 129 Stat. 584.

8. Amend § 127.12 by revising paragraph (b)(5) to read as follows:

§127.12 Voluntary disclosures.

* * * * *

(b) * * *

(5) Nothing in this section shall be interpreted to negate or lessen the obligations imposed pursuant to §§126.1(e), 126.16(h)(8), and 126.17(h)(8) of this subchapter.

* * * * *

Bonnie Jenkins,

Under Secretary,

Arms Controls and International Security,

Department of State.

[Billing Code: 4710-25]

[FR Doc. 2022-01889 Filed: 2/1/2022 8:45 am; Publication Date: 2/2/2022]